

1 UNITED STATES COPYRIGHT OFFICE

2 LIBRARY OF CONGRESS

3 Washington, D.C.

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5 In the Matter of: :

6 DURATION OF COPYRIGHT : Docket No. RM 93-B

7 TERM OF PROTECTION :

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10 The above-entitled matter came on for public

11 hearing, pursuant to notice, at 10:00 a.m.

12

13 BEFORE:

14 MARY LEVERING, Chairperson

15 MARILYN KRETSINGER, Panel Member

16 DOROTHY SCHRADER, Panel Member

17 ERIC SCHWARTZ, Panel Member

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1 WITNESSES:

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P R O C E E D I N G S

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[10:00 a.m.]

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CHAIRPERSON LEVERING: Good morning. I would like
to welcome all of you to the Copyright Office of the Library
of Congress.

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I am Mary Levering. I am the Acting Register of
Copyrights for the next several months, and I will be
chairing today's public hearing on the extension of the U.S.
copyright term to life plus 70.

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The other members of the panel are Dorothy
Schrader on my immediate right, the General Counsel of the
Copyright Office.

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Marilyn Kretsinger, the Assistant General Counsel
of the Copyright Office on the far right. And on my left,
Eric Schwartz, Policy Planning Adviser to the Register of
Copyrights.

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I will introduce each witness in the order in
which he or she speaks.

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Although at present there is no bill before the
U.S. Congress, there is considerable interest in extension
of the copyright term.

22

This interest is generated primarily by recent
events in the international arena and also by the fact that
valuable U.S. works are about to fall into the public
domain.

As you know, U.S. copyright law now specifies that
the term of copyright protection to be the life of the
author plus 50 years for works created by a natural author.

50 years beyond the life of the longest-living
author for works of joint authorship. 75 years from the
year of first publication or 100 years from the year of

1 creation, whichever is shortest, for anonymous and
2 pseudonymous works and works made for hire.

3 Two events in the international arena have
4 prompted this study. The European Community Member States
5 agreed in June 1993 to adopt a uniform standard of
6 protection and to set the term of protection to the life of
7 the author plus 70 years.

8 And a report by the Committee of Experts on a
9 Possible Protocol to the Berne Convention has stated that
10 the committee is studying the possibility of increasing the
11 Berne term of protection to life plus 70.

12 As a member of the Berne Convention, the United
13 States would need to consider enacting legislation to raise
14 its standards to the Convention minimum if such a proposal
15 were adopted by Berne.

16 Therefore, the United States Copyright Office
17 decided to prepare a report at this time on whether or not
18 the United States term should also be increased to life plus
19 70.

20 The Office published a Notice of Public Hearing
21 and a Notice of Inquiry in the Federal Register on July 30
22 of this year seeking public comment on specific issues
23 related to the broader question of whether or not the U.S.
24 law should be amended to provide a longer term of copyright
25 protection.

26 Although today we will be hearing from only three
witnesses, they represent 17 organizations. I would like
each witness to sum up his or her remarks in approximately
15 or 20 minutes and reserve the remainder of the time from
questions from the panel.

27 Each of your written comments will be filed with

1 the Office's report in their entirety.

2 Our first witness today is the well-known lyricist
3 Hal David who will be testifying on behalf of a newly formed
4 group, the Coalition of Creators and Copyright Owners.

5 This newly formed group represents 13 individual
6 organizations: ASCAP, the American Society of Composers,
7 Authors and Publishers; AIMP, the Association of Independent
8 Music Publishers; The Dramatists Play Service; Music Theatre
9 International; The National Writers Union; The Visual
10 Artists and Galleries Association, Incorporated (VAGA); The
11 Artists Rights Society; Broadcast Music Incorporated (BMI);
12 Graphic Artists Guild; Musical Theatre Coalition; SESAC,
13 Inc; The Volunteer Lawyers for the Arts; and The Writers
14 Guild of America, East.

15 Mr. David needs no introduction in this group. He
16 is well known and well appreciated. In collaboration with
17 Burt Bachrach, he authored a string of musical hits
18 including Raindrops Keep Falling on my Head.

19 He has won many awards including an Academy Award,
20 a Grammy, and he has 20 gold records. Mr. David served as
21 president of the American Society of Composers, Authors and
22 Publishers from 1980 through 1986. Mr. David, we welcome
23 you.

24 MR. DAVID: Thank you very much. Good morning.
25 Today I'm here representing not only songwriters, but all
 members of the Coalition of Creators and Copyright Owners
 which include music publishers, performers, visual and
 graphic artists, dramatists, authors and others.

 We came together and are here today because we all
 have in common our stake in copyright and our deep concern
 for its protection.

1 But even more important than our individual stake
2 is America's stake in one of its greatest resources, the
3 creativity of its people.

4 It is for this reason that we believe that the
5 term of copyright protection must be extended from the life
6 of the author plus 50 years to life plus 70.

7 The original framers of our Constitution knew the
8 value of copyright, which they stated was to promote the
9 progress of science and useful arts.

10 The practical application of this concept was
11 achieved by granting economic rights to creators and
12 copyright owners.

13 Copyright is clearly the foundation of America's
14 cultural supremacy. It is also one of the few bright spots
15 in America's balance of payments.

16 But if we are to compete in today's global market,
17 we will jeopardize both of these advantages unless we enact
18 copyright extension.

19 It basically comes down to this. By December of
20 this year, the European Community will formally adopt a
21 directive to harmonize the copyright term in all of its
22 member countries.

23 This will be for a period equal to the life of the
24 author plus 70 years. If we do not similarly extend our
25 copyright term, United States copyright holders will be at
 an extreme disadvantage.

For one thing, we would be subject to the rule of
the shorter term in Europe under the Berne Convention, which
means instead of being given national treatment by European
countries so that we're treated the same as European
copyright holders are treated in their own countries, our

1 authors would be given only life plus 50 years protection
2 abroad.

3 In other words, the works of U.S. authors will be
4 protected in Europe for a term that is 20 years shorter than
5 the term of protection for works of our European colleagues.
6 This, of course, will deprive us of a valuable source of
7 foreign revenues. Let's talk about revenues.

8 Recent history has seen a true worldwide demand
9 for the use of copyrighted materials. These materials,
10 whether they are music, films, books, art or computer
11 software, flow freely between nations. People around the
12 world line up to see Jurassic Park; they buy the music of
13 Bruce Springsteen and Dave Brubeck; they see productions of
14 A Chorus Line; they use Microsoft Windows, read the latest
15 novel by John Grisham, and buy reproductions of Roy
16 Lichtenstein's art. We truly inhabit Marshall McLuhan's
17 global village.

18 What is most striking about all of this is that
19 the copyrighted works the world wants most are those created
20 here in the United States. Our country's authorship sets
21 the standard for the world. The consequence, of course, is
22 not only cultural but economic.

23 Since American copyrighted works are far more
24 popular overseas than foreign works are here, foreign
25 payments for the use of American works far exceed American
 payments for works of foreign authors. For example, the
 U.S. collects many millions more in performing rights income
 from foreign countries than they collect from us. And
 focusing just on music copyrights, if you add to that the
 income from mechanical sales, you begin to see just how
 valuable American copyrights are to America.

1 It is no exaggeration therefore to say that
2 adequate international protection of United States
3 copyrights is a matter of great importance to our national
4 economic security. And especially in light of the EC
5 action, copyright term extension in the United States has
6 now become an essential element in safeguarding that
7 economic security. In addition, a shorter term will harm
8 American creators who will be deprived of 20 years of
9 valuable protection in one of the world's largest and most
10 lucrative markets. The United States film and television
11 industries alone have an estimated \$3.5 billion annual trade
12 surplus with the EC.

13 Since we can obtain an additional 20 years of
14 protection in the EC at virtually no cost to ourselves,
15 simply by extending our own copyright term, there is simply
16 no good reason not to do so. There are other compelling
17 reasons for adopting term extension. There has been an
18 increase in average life expectancy in the United States.
19 Americans are expected to live about six years longer as of
20 1995 than they did in the early 1960's, when the duration
21 provisions of the 1976 Act were first proposed. When we
22 multiply that increase by 3, to account for the three
23 generations of intended beneficiaries, a 20-year term
24 extension is certainly warranted.

25 Another justification for extending our copyright
term is that modern technologies have increased the value of
copyrighted works over a longer period of time. New media
have made older works more exploitable.

Term extension will also have the positive effect
of guaranteeing a greater return on investment, thus
stimulating economic investment by authors and publishers.

1 Any creator can tell you about the blood, sweat and tears,
2 not to mention financial deprivation, that so often
3 accompanies the creative process. We give so much and get
4 so little for so long that it doesn't seem fair for us not
5 to be able to hold on to our creative property for as long
6 as other people who have spent their lives acquiring real
7 estate can hold on to their property.

8 In order to take advantage of this golden
9 opportunity for American creators and copyright owners, for
10 our economy and for our culture, we urge that all United
11 States copyright terms be extended by 20 years. We further
12 urge that while this issue is under consideration, Congress
13 should extend the term of copyright for those works whose
14 terms would otherwise expire before the end of 1994. We
15 believe that these copyrights should be granted an extension
16 through December 31, 1994.

17 At risk are songs like: After You've Gone; I'm
18 Always Chasing Rainbows; Oh, How I Hate to Get Up in the
19 Morning; Rock-A-Bye Your Baby with a Dixie Melody; Somebody
20 Stole my Gal; A Pretty Girl is Like a Melody; Dardanella --
21 which I saw in the exhibits just as I was walking in this
22 room. It is at risk. And Swanee, the great Gershwin song.
23 The World is Waiting for the Sunrise.

24 And, of course, I've just listed musical works
25 because that's the area I know. But I'm sure there are many
more valuable works in other disciplines that will also go
into the public domain if a moratorium is not imposed at
this time.

I hope I have shown that there are many good
reasons to extend our copyright term by 20 years, and
virtually no arguments against term extension. We must act

1 now to preserve the creative incentive in our country and
2 secure the U.S. position as a world leader in global
3 copyright protection. The result will be that our creators
4 and copyright owners will be adequately rewarded at home and
5 abroad for their efforts and investments.

6 We therefore appeal to the Copyright Office to
7 recommend legislation to extend the term of all copyrights
8 by 20 years. This is a win-win situation. We cannot afford
9 not to act.

10 I thank you for your consideration and attention
11 to this most important issue of national and international
12 concern.

13 CHAIRPERSON LEVERING: Thank you very much, Mr.
14 David.

15 Before we go on to the question period, for the
16 record I would like to welcome Fred Koenigsberg, special
17 counsel to ASCAP who has accompanied Mr. David here this
18 morning.

19 And I would also like to mention one other point.
20 I need to slip out for a short time during this period to go
21 across to the other building to a gathering honoring the
22 signing of the CD ROM Agreement that the Library of Congress
23 has just recently negotiated with several information
24 industry associations on behalf of protecting copyright,
25 while at the same time arranging for deposit and use of
those in the Library of Congress.

So I will slip out for just a brief time and
Dorothy Schrader, the General Counsel, will continue the
hearing and then I will return immediately. Welcome, Mr.
Koenigsberg.

MR. KOENIGSBERG: Thank you so much.

1 CHAIRPERSON LEVERING: I thank you again for your
2 very clear presentation to us today, Mr. David.

3 MR. DAVID: Thank you for the opportunity.

4 CHAIRPERSON LEVERING: I'd like to ask a few
5 questions. What, if any, do you believe that the durational
6 aspect of American copyright protection have on the
7 viability of American copyrighted works abroad? You
8 addressed this in your remarks. Would you speak to that a
9 little bit more?

10 MR. DAVID: The EC is one of the greatest markets
11 in the world. Their gross national product is about 28
12 percent of the world's gross national product. American
13 copyrighted works are by and large the most popular works in
14 the EC and also around the world. It would seem to me that
15 by extending that 28 years the flow of income to the United
16 States and the U.S. creators would be much greater than the
17 flow out of the United States.

18 CHAIRPERSON LEVERING: Thank you. One side-effect
19 of the life plus system is that an author's later published
20 works receive a shorter period of protection than do his
21 earlier works. How can this inequity, if it does exist, be
22 remedied? And would term extension exacerbate this problem?

23 MR. DAVID: No. It's the same 20 years and we
24 would add 20 years to the 75 and 20 to the 70. So it
25 wouldn't exacerbate it. It would remain the same.

But I believe that the life plus 50 was very comparable to the additional 19 years given post 1978 and this would just remain in tandem and go along the same way.

CHAIRPERSON LEVERING: Thank you, Mr. David. Ms. Schrader, do you have any questions?

MS. SCHRADER: Thank you. How do you respond to

1 those who might argue that the increased life expectancy of
2 authors itself increases the term of copyright? Obviously,
3 authors live longer. And their early works, especially as
4 Ms. Levering noted, enjoy a long period of protection
5 already. What is your response to that? There is already
6 an increased term just because of longevity.

7 MR. DAVID: Well, at this point we have been
8 playing catch-up to everyone else around the world. When we
9 went to 75 years pre-1978, the term of copyright around the
10 world, and certainly in the EC countries, was life plus 50
11 going all the way back to the beginning of the century. So
12 we have really just been playing catch up. And if we don't
13 extend ours the next 20 years, we will be behind the curve
14 again.

15 It seems to me for once the United States should
16 be on top of the curve, and if not ahead of everybody else
17 at least equal to everyone else.

18 MS. SCHRADER: You mentioned the EC argument
19 again, and you of course make a strong argument that the
20 United States authors must be in a position to enjoy this
21 longer term when it's adopted in Europe.

22 And it's almost certain that will happen, that the
23 longer term will be adopted. However, I think some will
24 argue that we will enjoy that extended term only if we
25 overcome other inconsistencies between our law and the EC.
That is, they would argue that without perfect or near
perfect matching of rights, the EC will deny us reciprocity
anyway.

 And specifically, can we realistically expect to
resolve the constitutional problems related to restoration
of copyright in public domain works which will almost

1 certainly be required by the EC if they are going to give us
2 full reciprocity?

3 MR. DAVID: We believe, and it is our
4 understanding, that if we harmonize our term extension as
5 well we need to do to get the reciprocity of the longer term
6 rather than be the victim of the shorter term. To the
7 extent that our rights of copyrighted rights are involved,
8 many of those are constitutional in nature. And that is up
9 to Congress to do, if they see fit.

10 But it seems from everything we know, if we match
11 the term extension that there will be that extended
12 reciprocity. I would ask counsel to extend on those
13 remarks.

14 MR. KOENIGSBERG: I would be delighted to. It
15 seems to me, Ms. Schrader, that you asked two questions
16 really.

17 The first one being the nature of a reciprocity
18 question if we don't match certain other points. And I
19 think Mr. David has answered that.

20 The second being one that deals really with the
21 retroactivity question. That is to say, as works have
22 fallen into the public domain here they may have fallen into
23 the public domain for two reasons.

24 One, because they didn't comply with the technical
25 requirements that the U.S. law until very recently required
 such as notice or renewal. And secondly, because their
 terms expired, the full term of copyright having run its
 course. But they would still have been protected if the
 life plus 70 year term or 95 year term for pre-1978 works
 were in effect.

 And I'm talking here about both foreign works and

1 domestic works. Certainly there are constitutional issues
2 that are raised in the nature of extending full reciprocity.
3 I think our view is that retroactivity, not reciprocity,
4 should be extended both to foreign works and to domestic
5 works in all the situations that I have sketched out.

6 As to the constitutional issues, I think it is our
7 belief that they are solvable. They are slightly different
8 than those two different circumstances that we have
9 addressed. But I certainly think they are addressable and
10 solvable and indeed, if my memory serves, the issue of
11 restoration of copyrights of retroactivity rose in the
12 context of the NAFTA discussions.

13 And NAFTA requires such a restoration of copyright
14 term for Mexican and Canadian motion pictures. And as I
15 recall, some government agencies said we don't see a
16 constitutional impediment to that.

17 So I think these problems -- I don't even think
18 they are problems. I think they are issues that can be
19 addressed and solved.

20 MR. DAVID: It would seem to me by granting
21 foreign retroactivity they would be impelled to grant the
22 same thing to us. We have more to gain than we have to lose
23 in that because, again, the flow of money from created works
24 comes this way rather than the other way.

25 MS. SCHRADER: You are right, of course, to
mention NAFTA as an example where we have in effect made a
partial commitment to apply retroactivity. My understanding
is that the language is hedged in terms of our ability to do
it constitutionally. So that would be the ultimate question
and perhaps can only be resolved by the courts in an
appropriate case.

1 One other question. One of the persons who have
2 commented to us, David Nimmer, sent in a Law Review article
3 that he had published. And in this article he mentions his
4 opinion that the world copyright community largely avails
5 itself of the rule of the shorter term.

6 And my questions are, first, do you agree with
7 that statement that the rule of the shorter term is
8 generally applied? And second, if you do agree could you
9 share with us whether that has been applied through
10 legislation or whether it has been applied by court
11 decisions.

12 And we, of course, would like to have any follow-
13 up source materials that you could share with us for the
14 record.

15 MR. DAVID: The shorter term I don't think has
16 been something that the music business, the area that I have
17 some knowledge about, has been something that has been used
18 to our disadvantage. Usually that has been negotiated and
19 worked out without any problem in the past. The problem
20 today is there is a Directive that the EC must apply the
21 shorter term. And there is no way out of that.

22 By applying the shorter term, if we do not take
23 advantage of the additional 20 years we will suffer a great
24 economic disadvantage. And to the extent that we do extend
25 ours for the 20 years, this may be the first time that we
can apply the shorter term to other countries, non-EC
countries that have not extended their copyright law. And
perhaps it may be time that we are ahead of the curve
instead of behind the curve.

 MR. KOENIGSBERG: If I could add only that you ask
rather technical legal questions as to whether other

1 countries have done so, I think to a considerable degree
2 they have. But I confess I haven't researched the issue
3 fully. I do know that some have done it by legislation.
4 Some have done it by court decision. Some European
5 countries have done it by court decision.

6 And you ask if we could supplement our statement
7 on that point, I think we would be delighted to.

8 MS. SCHRADER: I have no other questions.

9 CHAIRPERSON LEVERING: Thank you. Ms. Kretsinger,
10 the Assistant General Counsel.

11 MS. KRETSINGER: I have one question. You talked
12 in your opening statement about the constitutional provision
13 and the fact that copyright is based on promoting the
14 progress of science and useful arts. Part, of course, as we
15 know of that constitutional provision also is a requirement,
16 a statement that this shall be for a limited time.

17 Is it your feeling that this extension of 20 years
18 should be solely for the benefit of the copyright
19 proprietor? Or do you foresee some kind of a scheme where
20 part of it would go into the government to provide monies to
21 fund something like the National Endowment for the Arts?

22 MR. DAVID: We see the additional 20 years to be
23 for the benefit of the creators and the United States
24 because of the great flow of income that will be coming into
25 the United States. The limited term that is mentioned is
 for Congress to decide what is a reasonable limited time.

 It would seem that with the additional longevity
 that we all are enjoying and expect to enjoy from 1995 on,
 makes 20 years a reasonable additional term. And 20 years
 is limited.

 MS. KRETSINGER: Right. It's another incremented

1 limitation.

2 MR. DAVID: Yes.

3 MS. KRETSINGER: Thank you.

4 CHAIRPERSON LEVERING: Thank you, Ms. Kretsinger.

5 Mr. Eric Schwartz, our Policy Planning Adviser.

6 MR. SCHWARTZ: Thank you, Mary. Thank you for
7 inviting me on the panel. I am somewhat of a late comer to
8 this process.

9 I had first before I asked a question, because of
10 the very compelling testimony, I had more of an observation
11 maybe for my own benefit and hopefully for someone else's as
12 well which is that I hope that we would keep this process
13 somewhat informal as we move to write a report for the
14 Librarian for the Copyright Office.

15 And in that process invite additional comments
16 from a lot of interests that are not represented here. Not
17 at all to diminish the contributions of the organizations
18 that are here. But just in looking over the material,
19 because the case is made of the trade interest and that this
20 is being driven by trade interest.

21 It seems from my limited experience in
22 international copyright that the areas like electronic
23 industries, the software industries, publishing industries
24 that are obviously very dominant in our government and
25 private sector trade interests haven't been heard from. I'm
maybe making the carnal sin as a lawyer in asking a question
that I don't know the answer to.

And in addition the distribution interests for
domestic purposes, broadcasting and user interests,
educators, librarians, video distributors of materials, for
example, that are very difficult or out of print to receive.

1 So I would sort of hope that in this process we might invite
2 additional comments and maybe even have another public
3 hearing. Because especially in the trade interest I also
4 wonder whether or not there would be more pressure to expand
5 during the term of protection uses for these other
6 interests, especially in the software industry where fair
7 use and decompilation issues and competition issues are so
8 prevalent.

9 As I say, you make a very compelling case for life
10 plus 70 for individual authors. I'm curious as to why you
11 would also add legal entities, juridical entities, since it
12 seems like what you are proposing goes beyond the term that
13 the EC software Directive recommends since they primarily
14 are looking for 70 years.

15 MR. DAVID: We are seeking the 70, but also adding
16 20 to every other aspect of the copyright term.

17 MR. SCHWARTZ: If the case is made that this is
18 mostly about trade and reciprocal protection between the
19 United States and European works, we are providing more than
20 the software Directive requires for works made for hire and
21 works of legal entities. Why would we also extend the term
22 there?

23 MR. DAVID: It would seem to me by extending the
24 term of copyright rather than letting works go into public
25 domain, it is a stimulus to creativity. And by allowing
works to go into public domain, that's an impediment to
creativity. And it would seem to me that the copyright law
is meant to stimulate creativity. For that reason alone I
think it is terribly important to do.

 MR. KOENIGSBERG: If I could add to that. First
of all, we are focusing on not merely the software Directive

1 but on the overall term extension Directive of the EC.

2 Secondly, as a legal matter the United States
3 copyright law has not distinguished the source, if you will,
4 of the creativity, be it work for hire and not work for hire
5 and so on.

6 We have not made the distinctions in term of
7 copyright term amongst types of works, cutting the term back
8 for certain types of work as opposed to others. That is
9 very much the United States tradition. We don't think that
10 we need to address that question. We should address that
11 question as our full statement which was submitted to you
12 says.

13 We have to stay with the United States tradition
14 in terms of term extension. Whatever they do in the EC,
15 that's not what we do here. We have to gain the advantage,
16 of course, that that will flow to us from the term extension
17 and that's really the thrust of our point.

18 And beyond that, when you deal with works of
19 juridical entities as opposed to individual authors or
20 individual authors who are then copyright owners, authors
21 can transfer their copyrights of course. Remember that our
22 copyright law speaks not only of the legal ownership of
23 copyright, but also the beneficial ownership and the
24 beneficial interest in copyright.

25 And individuals, even in cases of works made for
hire and other works that belong to juridical entities,
individual creators would gain from an extension of term.
So it is very much in the United States tradition to treat
it that way.

 MR. SCHWARTZ: I also didn't see a mention of what
impact you would see on the termination of transfer. And I

1 guess I have two questions.

2 One, what would you see happening to the
3 termination period? And second, how would you see the
4 benefits accruing for existing expectancies in contracts
5 law? The termination of transfer provision under the
6 copyright law. How would that be defended?

7 MR. DAVID: The termination rights is something
8 that the various parts of this Coalition and other members
9 who are not in the Coalition are sorting out right at the
10 moment. And we hope and expect that before a bill is
11 introduced into Congress, we will all come together and find
12 a successful resolution to this. I don't think that is
13 going to wind up being a serious impediment.

14 MR. SCHWARTZ: Thank you very much.

15 CHAIRPERSON LEVERING: Thank you very much, Eric.
16 Just picking up on a couple of the comments that you made,
17 Eric, this is an informal introductory process and there are
18 very many issues as part of all of this. And I agree with
19 Eric. Your statement is very compelling.

20 It is important in this process that we hear from
21 all of those who have interests so that we can compile as a
22 fair and balanced report representing all of the concerns as
23 possible. And that's very important to us.

24 So picking up on the comments that you made, we
25 will indeed be doing it. We are most appreciative of your
testimony today and additional comments. Before you leave
the table, would you introduce the others that you have
brought with you in your party? I think we would all like
to meet your colleagues.

 MR. DAVID: Yes. Thank you very much. The
president of ASCAP, Morton Gould. One of our very

1 successful popular country writers, Pat Alger. There is
2 Thea Zaven, who is executive vice president of BMI and a
3 leading figure in the music business. And my wife, Eunice
4 David, who is most important. And Karen Sherry, who is the
5 director of public affairs for ASCAP.

6 CHAIRPERSON LEVERING: We welcome all of you
7 today. Thank you very much.

8 MR. DAVID: Thank you so much. I appreciate your
9 courtesy.

10 CHAIRPERSON LEVERING: Our next witness is Susan
11 Mann, of counsel to the National Music Publishers'
12 Association. If you would come forward, please.

13 She is also speaking for the Music Publishers'
14 Association and International Confederation of Music
15 Publishers.

16 Ms. Mann is a specialist in domestic and
17 international copyright issues with Griffin and Johnson
18 Associates.

19 Before coming to Griffin and Johnson, she served
20 as an attorney adviser to the Patent and Trademark Office.
21 And before that, was an associate of Paul, Weiss and Rifkin
22 where she focused on legislative and copyright matters.

23 We welcome you today, Ms. Mann. Would you
24 introduce your colleague?

25 MS. MANN: Certainly. This is Charles Sanders.
Charles is also a copyright attorney and he is special
assistant to the president of NMPA.

 Thank you for the opportunity to be here this
morning. I am pleased to offer the comments of the National
Music Publishers' Association.

 Founded in 1917, NMPA is the principal trade

1 association for the American music publishing community.
2 Its 514 members are the largest and most active music
3 publishing entities in the world. Music publishers are,
4 generally speaking, copyright holders of musical works.
5 Their role is to nurture the creativity of songwriters and
6 composers through artistic, professional, and economic
7 support. Following the creation of the musical work, the
8 publisher functions as its promoter seeking recordings,
9 performances, and other modes of distribution of the work.

10 The music publisher also administers the copyright
11 in the work and takes steps to protect it from unauthorized
12 exploitation, including acting as an advocate sometimes
13 individually and sometimes through NMPA for strong copyright
14 protection and enforcement throughout the world.

15 The music publisher also serves as a friend and
16 counselor in the overall development of the creator's
17 career. For all of their contributions to the creative
18 process, publishers enjoy a close partnership with their
19 songwriter and composer colleagues.

20 NMPA believes a proposal to extend the duration of
21 copyright protection under United States law is truly a
22 proposal for the benefit of the arts. Many sound arguments
23 may be offered in its support, several of which have already
24 been noted by the Copyright Office in the background
25 discussion that accompanied the announcement of these
hearings.

In light of the special role that music publishers
play in the creative process, and because of the strong
bonds between publishers and their songwriter and composer
partners, NMPA is especially pleased to voice its support
for term extension. Extending the term of U.S. copyright

1 protection would have a profound, beneficial effect upon the
2 songwriting and music publishing industry without causing
3 harm to the interests of any person or entity.

4 During the legislative debate preceding the
5 enactment of the 1976 Copyright Act, Congress clearly stated
6 its intention for the United States to conform to the
7 internationally recognized copyright principle that, at a
8 minimum, the author and his or her next two generations of
9 descendants should receive fair economic benefit from the
10 exploitation of the author's works.

11 The life of the author plus 50 years term of
12 protection in the 1976 Act was adopted with a view toward
13 the Berne Convention's minimum term of protection recognized
14 at that time to generally represent the term necessary to
15 guarantee benefits to two generations of the author's
16 family. Given the increases in life expectancy -- and I'm
17 particularly an expert in this next point -- and the trend
18 for postponing childbearing until somewhat later in life, it
19 is questionable whether at this juncture a mere 50-year term
20 beyond the author's death continues to achieve the desired
21 goal. Taking a plausible example, an author who dies at age
22 70 survived by young grandchildren or possibly even children
23 cannot reasonably expect that his works will continue under
24 copyright protection throughout their lifetimes. An
25 extension of the term of protection by 20 years would better
reflect the evolving life patterns of Americans as we enter
the 21st Century.

There are, in addition, special circumstances
affecting individual songwriters and composers which provide
further evidence of the fairness underlying the term
extension. For example, works created by a young songwriter

1 who suffers an untimely death at the height of his or her
2 creativity will clearly not receive the two generations of
3 protection envisioned under the Act. The family of
4 naturalized American songwriter John Lennon is a victim of
5 this anomaly. His assassin effectively reduced the term of
6 copyright protection for the musical works created by Lennon
7 in the final years of his life to a mere 50 years. This
8 represents a shorter term of protection than the 56 years to
9 which he and his family would have been entitled under the
10 unamended 1909 Act. Protection of Lennon's solo works under
11 U.S. law will very likely expire during the lifetimes of his
12 children.

13 Other American songwriters falling into this
14 unfortunate category include Harry Chapin, Ricky Nelson,
15 Stevie Ray Vaughan, Karen Carpenter and others. The
16 families of creators from other disciplines such as Jim
17 Henson and Keith Haring are similarly affected.

18 The 50-year measurement has an equally unfavorable
19 effect on the prolific composer who continues creating well
20 into maturity. The late Leonard Bernstein's most recent
21 works, for example, will enjoy a relatively shorter term of
22 protection than will his pre-1978 works, which are
23 effectively protected for 75 years from the date of their
24 initial publication.

25 NMPA is concerned by these inequities. There is a
strong tradition in this country that a person who amasses
an estate in the form of cash, stock or real estate has a
right to expect that his legacy will provide benefits and
security and their heirs. Congress has every reason to
provide this same peace of mind to creators.

The proposal to extend the term of copyright

1 protection for an additional 20 years is a clear step
2 towards preserving the congressional intent that underlies
3 the 1976 Act, to provide protection to the surviving spouse,
4 children and grandchildren of the author. The
5 constitutional framers were keenly aware that economic
6 rewards are the best incentive to encourage the progress of
7 science and the arts in the United States.

8 In today's world, we have seen near-universal
9 adoption of the principle that strong copyright laws foster
10 rather than discourage the creation and broad dissemination
11 of cultural works. Where adequate and effective copyright
12 protections exist, creativity flourishes and wide
13 distribution to the public of copyrighted works at
14 competitive prices is commonplace.

15 Where protection and enforcement are weak,
16 incentive and investment are often replaced by artistic
17 indifference and rampant piracy. Moreover, when a work
18 falls into the public domain, its availability to the public
19 in that territory is often diminished.

20 Without guarantees of exclusivity in manufacturing
21 and distribution, a publisher will often decline to invest
22 in the publication of a public domain work for fear of a
23 severely diminished economic return. The result is a dearth
24 of quality copies of many works after their term of
25 protection has expired. Thus, the exclusive rights
conferred by the U.S. Copyright Act on creators and
copyright owners serve the public in two ways: by providing
incentives for authors to create new works; and by providing
similar economic impetus for publishers and other copyright
owners or assignees to distribute the works broadly to
members of the public.

1 The extension of the term of U.S. copyright
2 protection to life of the author plus 70 years will serve to
3 strengthen these incentives to the benefit not only of
4 creators and copyright owners, but in a broader sense to the
5 public as well.

6 Perhaps the most persuasive reasons for extending
7 the term of U.S. copyright protection are related to the
8 international and trade implications of such action. As is
9 made clear in the comments of Coalition of Creators and
10 Copyright Owners, extension of U.S. protections would
11 accomplish three key goals in this area:

12 It would improve the standing of the U.S. as a
13 leader in the important economic area of international
14 copyright protection.

15 It would guarantee reciprocal protections in the
16 European Community and in other territories with an extended
17 copyright term.

18 And it would help sustain the trade surplus
19 provided to the U.S. economy by the American copyright
20 industries.

21 Increasingly, the U.S. economy is supported by the
22 production of intellectual property by American creators. A
23 1992 report prepared for the International Intellectual
24 Property Alliance, of which NMPA is a member, estimated that
25 the American copyright industries account for nearly 6
percent of the U.S. gross national product. These
industries produced over 34 billion in foreign sales in
1990, substantially reducing the U.S. trade deficit.

 Growth among American copyright industries
averaged more than double the growth of the rate of the U.S.
economy as a whole during the 1977 to 1990 period. This

1 vitality can only be sustained in a global environment
2 hospitable to strong copy right protection.

3 In light of such statistics, the benefits to the
4 United States in maintaining a leadership position in the
5 international copyright community are self-evident. By
6 extending the term of U.S. protection, we will send a clear
7 signal to our trading partners in Latin America, the Pacific
8 Rim, Eastern Europe and elsewhere that we are willing to
9 support our demands for increased protection in those
10 territories with improvements in our own laws.

11 Further, by satisfying the reciprocity
12 requirements of the EC's soon to be adopted directive
13 calling for implementation of the harmonized life plus 70
14 copyright term throughout the Community, the U.S. will avoid
15 discriminatory treatment and devaluation of U.S. works in
16 the vast and important EC market. Our balance of trade will
17 similarly be augmented with the continued protection in
18 Europe for 20 more years of great American works such as
19 Moonlight Serenade by Glenn Miller and Ain't Misbehaving by
20 Fats Waller -- two works among many which will soon
21 otherwise pass into the public in the Community.

22 If consideration of the extension of the duration
23 of copyright is to proceed, NMPA also supports other related
24 changes in the U.S. Copyright Law to ensure equitable
25 treatment of all works, creators and copyright owners.

These would include extension of the copyright term for pre-
1978 works and all works for hire for an additional 20
years, adjustment of other provisions governing the rights
of copyright owners and assignees and immediate enactment of
interim legislation to ensure that no works fall into the
public domain during consideration of more comprehensive

1 copyright term extension legislation. Such measures were
2 enacted during the years leading up to the 1976 Copyright
3 Act.

4 Finally, it is important to note that in a very
5 real sense Congress would be acting to preserve American
6 culture by enacting copyright extension legislation.

7 According to Library of Congress records, tens of thousands
8 of American musical works fell into the public domain during
9 the 1980's and early 1990's including such well known
10 favorites as Alexander's Ragtime Band, Take Me Out to the
11 Ballgame, Beale Street Blues, Over There, and one of the
12 most recorded songs in history, St. Louis Blues. Over the
13 next 20 years or so the stakes will be much higher.

14 Many works written or co-written by American
15 musical giants such as Gershwin, Hammerstein, Ellington,
16 Porter, Harberg, Berlin, Rodgers, Calloway, and many others
17 including It Had to be You, Am I Blue, Sweet Georgia Brown,
18 and Tea for Two will be injected into the public domain.
19 These works are printed in the fabric of American life and
20 remain popular in many markets around the world. The lapse
21 of protection for these works will be detrimental not only
22 to the authors' families, but to the U.S. balance of trade
23 and the U.S. public interest as well.

24 NMPA believes it is imperative for Congress to
25 augment protection of these national treasures. NMPA is
 pleased to be joined in support of term extension by two
 other leading organizations in the music publishing
 community. These organizations, the Music Publishers'
 Association of the United States, MPA, a trade group whose
 members are principally involved in the production and sale
 of sheet music, and the International Confederation of Music

1 Publishers, ICMP, an organization advancing music publisher
2 interest worldwide, have submitted separate comments which I
3 will briefly summarize.

4 MPA's comments detail the substantial up front
5 investment required in publishing serious works of music and
6 explains how reciprocal earnings that are typical for such
7 works weigh in support of term extension. In MPA's view,
8 term extension would enable publishers of serious music to
9 recoup investments for a greater percentage of works and
10 increase working capital available to investing in the
11 encouragement and dissemination of new classical work.

12 ICMP has offered its perspective on term
13 extension. First from its participation and efforts to
14 encourage the EC Commission and Council to organize
15 copyright term within the Community at the life of the
16 author plus 70 years. ICMP notes that the Copyright
17 Office's consideration of term extension issues is
18 appropriate in light of imminent EC action and the ongoing
19 dialogue on copyright term and other issues in Berne
20 Protocol discussions proceeding under the auspices of the
21 World Intellectual Property Organization.

22 ICMP argued unsuccessfully before the EC
23 Commission for national treatment by member states in
24 extending the full available term of protection to works of
25 foreign nationals. And the group points out here that U.S.
 publishers and writers have the most to lose when the
 Communities resorts to reciprocity in this area. For this
 reason, as well as for the reasons covered in NMPA's own
 comments, ICMP urges U.S. policymakers to assume a
 leadership role in forging international consensus in
 support of the life plus 70 term.

1 In conclusion, the proposal to extend the term of
2 U.S. copyright protection can truly be characterized as a
3 win-win-win proposition. Such legislation would benefit
4 composers, their families, and their music publisher
5 partners by increasing the value of copyrighted works. The
6 American public would likewise benefit from the increased
7 creativity and availability of works resulting from a longer
8 period of protection.

9 Finally, the U.S. economy as a whole would benefit
10 from the expanded compensated use and protection of American
11 works abroad. NMPA looks forward to the Copyright Office's
12 further examination of this timely issue, and is prepared to
13 expand upon or clarify its comments at the Office's request.
14 Thank you.

15 CHAIRPERSON LEVERING: Thank you very much. That
16 was certainly a very comprehensive statement.

17 I'd like to ask you to comment on this thought.
18 Some maintain that the sooner a copyright expires, the
19 sooner works enter the public domain. And that while
20 protected by copyright, other creative users need permission
21 to make derivative works like films, adaptations to the
22 novel and so forth, a transaction and cost that limits the
23 number and scope of derivations that can be made. And some
24 say, therefore, that the sooner works enter the public
25 domain, the sooner explosions, derivatives works are made
possible. And that this increases the public exposure to
the work. I'd like to ask you to comment on that.

MS. MANN: It's not secret to any of us that the
copyright law is a balancing act. Our entire copyright law
is a balancing act. The term of protection is what
underlies the theory of availability of benefits to the

1 original creator, the person who made the work to begin
2 with.

3 While the eventual passage of a work into public
4 domain -- and I'm not familiar with whether this is in fact
5 the case -- arguably leads to an increase of derivative
6 works, the fact remains that unless there were incentive to
7 create the original work those derivative works would have
8 nothing to be derived from.

9 So it's focusing perhaps on the wrong end of the
10 equation. Our concern is with preserving the incentive to
11 create in an environment where cost of production and
12 publication of works are increasing. And where still
13 relatively few works do recoup investments.

14 And it's that ability to continue to encourage the
15 creative process up front and to have a stream of works made
16 available to the public for others to build upon and, if you
17 will -- I don't want to use the word improve upon -- but
18 expand upon. That is really a primary concern.

19 I think one of the points that we raise in our
20 comments is that in some cases there may be an incentive to
21 wait until a work has fallen into the public domain to make,
22 for example, a motion picture from it.

23 In practice, I think it works most often the other
24 way. That the ability to take a work that is quite popular
25 and to have the exclusive right to transfer that novel into
 another medium of exploitation is most valuable to a studio.
 It is what is going to get people to come forward and invest
 the money that it takes to make a derivative work that
 requires that magnitude of investment.

CHAIRPERSON LEVERING: Thank you very much.

Dorothy?

1 MS. SCHRADER: We, of course, do have a system
2 which involves a copyright clause in the Constitution that
3 requires limited term. So, however much the natural
4 inclination of proprietors might be to have perhaps a
5 perpetual term or at least a term as long as possible,
6 clearly Congress will set limited terms.

7 The terms that have now been set presumably were
8 intended to encourage a certain level of creativity and
9 dissemination of works for the benefit of the public. When
10 that term expires the public is entitled to use the work
11 without any further charge.

12 So how can there be any justification for
13 extending the term of copyright again in works that are
14 already in being? Works that are already created. You
15 certainly can't add to the incentive to create as far as
16 those works are concerned.

17 MS. MANN: You can if the author of those works is
18 still living. That may work arguably if you are talking
19 about an author who is deceased and you are only looking at
20 the term of benefits.

21 MS. SCHRADER: It would encourage him or her to
22 create other works. But for the works that have already
23 been created, isn't there a bargain that has already been
24 reached? So many years of protection in exchange for the
25 creativity.

MS. MANN: Yes. There is a bargain that was known
to the author at the time or at the time that his work was
created. Copyright policy evolves. And it evolves to
accommodate a range of circumstances, economic
considerations, and realities of the marketplace as well as
realities of the creative process.

1 I think when you look at rewriting that bargain,
2 that perhaps is when the trade aspects of what is happening
3 here become the most compelling. Unless we rewrite that
4 bargain for our own authors, foreign creators are going to
5 be reaping a windfall for the use of U.S. works.

6 And that goes particularly in the case of the
7 music industry work. A good portion of income is derived
8 through licensing practices -- I'm talking about public
9 performances primarily -- that are not tied to the use of an
10 original work.

11 In Europe, radio stations will be playing American
12 music. People will be tuning into that music and listening
13 to that radio or television station to receive the benefit
14 and enjoyment of the music. And we won't be getting
15 compensated for works that are in this expanded sphere.
16 That money will be going to European authors.

17 It becomes a question of balance and fairness.
18 And I understand what you're saying. But I think one has to
19 look across the board for a broader perspective.

20 MS. SCHRADER: Do you know of any opposition to
21 term extension either from commercial users of public domain
22 works or from non-profit educational groups?

23 MS. MANN: I'm not aware of any. None has been
24 brought to our attention directly.

25 MR. SANDERS: We certainly haven't actively gone
out and beat the bushes to drum up opposition. But I think
we can certainly truthfully say that no one has come forward
to our knowledge to oppose the notion of extension
protection.

 MS. MANN: Gus Steinhilber. It's a gut reaction
my guess is.

1 MS. SCHRADER: We may indeed get written comments
2 from Mr. Steinhilber.

3 MS. MANN: I imagine so. But none others have
4 come directly to our attention.

5 MS. SCHRADER: I will observe that in addition to
6 publishing the Notice in the Federal Register to of course
7 invite comments from all interested parties, since this is
8 an informal proceeding leading to a report we have made
9 direct contact with a number of groups from the user
10 community, the library community and the education community
11 to bring the Notice to their actual attention and invite
12 them to come, if they wish.

13 As Ms. Levering will say at the close of the
14 hearing, but I will anticipate somewhat since this matter
15 has been raised earlier by Eric Schwartz, the hearing record
16 will be open at least 30 days following the close of this
17 hearing for additional written comment either for people who
18 have already commented and want to reply further or for
19 comment from those who haven't previously contacted us.

20 If as seems to be the case, and this I believe is
21 in the Coalition comments, U.S. life expectancy has only
22 increased about five or six years since 1964.

23 And I assume the 1964 date is used because that is
24 when the basic political agreement was reached about the
25 term for the U.S. law which was then finally enacted in
1976, effective '78.

So if life expectancy is increased five or six
years since then, the author gets the benefit of that during
his or her lifetime.

We double five years. We get a justification for
an extension of ten years. Aside from the fact that the EC

1 is going to extend the term by another 20 years, what is the
2 domestic policy justification for a 20-year extension?

3 MS. MANN: I don't want to say that the EC has
4 gotten it all right in their Directive on permanentization
5 of term. They haven't gotten it all right. They've
6 resorted to and have clung to reciprocity. They continue to
7 distinguish in what we view is an equitable way between
8 works of juridical entities in terms of the protection
9 available and works of authors.

10 But I think that the WIPO, the international
11 bureau's comments on this issue and the documents that were
12 prepared for Berne Protocol discussions most recently in
13 June summarizing early deliberations on this issue probably
14 gave what is the most credible policy justification. And
15 that is that you've got to go somewhere. You look at what
16 countries that have terms beyond life plus 50 have.

17 Life plus 70 is the most common term. You can't
18 call it a critical mass of countries that have a life plus
19 70 term. But there are more of those than there are of any
20 other number. There are a few that have a term of life plus
21 60. And some, I think it's the Ivory Coast that has the
22 longest term of copyright which is the life of the author
23 plus 99 years.

24 You can say that not only is this the mean, but
25 it's the average term. And if you are looking at not only
 the domestic policy implications, but the role of extension
 of term to that number and the U.S. would have in terms of
 international organization and efforts which we also view as
 extremely beneficial, life plus 70 becomes a rational place
 to focus the dialogue.

 MS. SCHRADER: Thank you. Marilyn Kretsinger?

1 MS. KRETSINGER: You say in your statement and
2 also in your oral statement that the argument for the
3 extension of term is for the benefit of the arts.

4 I'd like to ask you the same question that I asked
5 the other commentator. Do you see this extension period as
6 being one to benefit the copyright proprietor? Or do you
7 see it as one where some of the money could actually go into
8 a fund for the benefit of artists or the arts? Something
9 similar to the National Endowment for the Arts.

10 MS. MANN: I'm still too close to my last
11 experience at PTO to have the nerve to make the statement
12 that the U.S. set aside cultural funds. Because this is
13 something, especially in dialogues from the Europeans, that
14 they talk about.

15 MS. KRETSINGER: It's something that the Europeans
16 do.

17 MS. MANN: They do very frequently. And I will
18 admit that our National Endowment for the Arts doesn't come
19 close to providing that kind of support for individual
20 artists.

21 But I think that as a public policy matter, that
22 shifts the nature of the way copyright has been viewed in
23 this country as a private proprietary right. And it also I
24 think would raise considerable problems, hassles, for our
25 trade negotiators who find themselves fighting against that
kind of thing and aggressively having to do so in other
territories.

I think the benefits that flow to copyright owners
and copyright beneficiaries as Fred pointed out under our
law flow through the aggressive exercise and exploitation
what are essentially private rights.

1 MS. KRETSINGER: I don't believe you commented on
2 the retroactivity issue. And I think particularly since
3 there are a lot of people out there -- at least I have
4 gotten calls from a lot of people who are going to be
5 submitting written comments who are strongly opposed to any
6 kind of extension of term.

7 Particularly, what would happen if it were made
8 retroactive and the work has already been considered to be
9 in the public domain and they have actually used the work?
10 Do you have anything that you want to say on the retroactive
11 issue?

12 MS. MANN: No. I don't have a solution. But I
13 think two points that Ms. Schrader raised when she was
14 questioning Mr. David and Mr. Koenigsberg are things that we
15 have to bear in mind in this.

16 The NAFTA agreement, and Ms. Schrader is quite
17 correct, hedges the U.S. obligation to extend retroactive
18 protection to nationals and parties to that agreement in
19 terms of our own constitutional -- and I'm paraphrasing.
20 But in terms of our own constitutional obligations and
21 economic considerations, both are mentioned.

22 The people who negotiated that language were very
23 much aware that there is a concern in the United States that
24 once a work falls into the public domain, individuals who
25 invest in the exploitation of that formerly protected work
have a property interest not in that work any longer because
of course it is available to anyone in the public, but in
their investment in those physical things that they
manufacture or produce to sell to the public.

 And under our Constitution there are concerns that
telling them that they can no longer dispose of those copies

1 or exploit them in whatever way they had is a taking in
2 constitutional terms and that some compensation is
3 warranted.

4 The NAFTA exercise, I would be inclined to believe
5 that when the Administration comes forward with its package
6 of NAFTA implementing legislation, they will have a fix or
7 an attempted fix for what is primarily a Mexican
8 retroactivity problem. And that we will get a chance to see
9 what our colleagues who deal with this stuff on Capitol
10 Hill, how they react to that.

11 What arguments the Administration people and the
12 Justice Department people who have researched this to a far
13 greater extent than I am aware have on that point and we may
14 all benefit from it.

15 But I think Ms. Schrader was absolutely right when
16 she said that extending term in the United States will get
17 us a foot in the door and it will let us pass the red face
18 test. And it will give us something to say to the
19 Europeans, look, we are worthy of this reciprocal
20 protection. But they are going to continue to come back at
21 us on retroactivity and the nature of the rights, the civil
22 rights we protect and that kind of thing and chip away.

23 But the point remains that the biggest hurdle in
24 all of that is the question of the term of protection
25 itself. And without that we are not even into the ballpark.
We are not even at the door and able to discuss it with them
in a credible manner.

MS. KRETSINGER: I can tell you that one of the
big arguments that the opposing side is going to make is
that you are really asking for more than the EC directive
gives because we already have a term for works for hire that

1 potentially is longer than the one, if it's a published
2 work, in the EC Directive. So how could you answer that?

3 MS. MANN: They are two different issues. There
4 is a domestic policy consideration and an international
5 policy consideration.

6 As I said earlier, that by saying that the
7 Europeans are right to think about term extension I don't
8 think we need to concede that they are right about
9 everything they have done in this Directive. The Europeans
10 have a way of viewing creators in a hierarchy. Natural
11 persons who create, natural authors, authors' rights are at
12 the top of that hierarchy. And they don't have the
13 philosophical problem that we do, if you will,
14 discriminating against juridical entities.

15 No one would say under our work for hire doctrine
16 that a juridical entity cannot be a creator in that sense, a
17 copyright owner in that sense. The Europeans don't buy into
18 that and consequently are content to give works of juridical
19 entity a lesser status.

20 That's another thing that we fight about long and
21 hard internationally. And I would be very interested to see
22 what our colleagues in the motion picture industry would
23 have to say on that point because that really hits.

24 We are dealing with works of authors for whom we
25 take rights by transfer. That is an issue that most closely
affects them and others and it would be interesting to see
their views on that point.

MS. KRETSINGER: I have one last question and
again it is directed toward I think the sort of argument
that is going to come to those who are in strong opposition
of the bill. Part of the change in the '76 Act is a

1 balance. It's true that works created late in life plus 50
2 may indeed have a shorter term. But works created earlier
3 in life have a longer one than the 1909 Act. So how do you
4 address this? How does the argument play out that because
5 John Lennon's life was cut off short and his later works
6 enjoy only 50 years' protection when we have already given
7 him a term for the earlier works that is longer?

8 MS. MANN: In his case it won't be a lot longer
9 though because his earlier works weren't that much earlier.
10 But with somebody like Bernstein who created works for a
11 long period of time, you're right.

12 But one would hope that looking forward to a mass
13 to continue to reap the benefits of creativity of one's late
14 life and seeing the subsequent generations receive the
15 benefits of the exploitation of those works provides
16 additional incentive to create.

17 It's the same kind of argument and thought that
18 one would have to go through to have bought in 1976 the
19 switch to a term measured by life. And it's simply I think
20 a matter of recognizing that individual creators generate
21 during their lifetimes for as long as they feel the
22 incentive to be productive, works that we all enjoy forever
23 and ever after. We may have to pay for them for a period of
24 time. But those are never taken away from us ever.

25 And the question becomes how long do we want to
allow the heirs of that person to reap a benefit that we
seem to all have bought into. The economic benefit provided
some incentive for the creator to create through.

 MR. SANDERS: I would just add that the additional
20 years in the case of the young creator dying with
children I think would make a substantial difference to the

1 children of that creator. When you talk about a case in
2 point, a colleague, Harry Chapin who left five children, the
3 additional 20 years making it life plus 70 would certainly
4 extend to probably, God willing, cover the life of his
5 children. I think that is an important distinction. And
6 that was one of the points that we were raising by calling
7 your attention to those and others.

8 MS. KRETSINGER: Thank you.

9 CHAIRPERSON LEVERING: Eric?

10 MR. SCHWARTZ: I think that during the automatic
11 renewal bill Congress was convinced, and if I could
12 editorialize I would say rightfully so, by the arguments
13 that are made that works are more likely to be available
14 when they are under copyright protection than when the term
15 of protection expires for most commercial works. But you
16 yourself said that the law evolves and is a balance.

17 And I'm wondering what your thoughts are on
18 whether or not Congress will be asked to re-examine the
19 balance with regard to uses by educators and librarians with
20 the explosion of works, the number of works, and the number
21 of uses that educators and libraries need to make of works.
22 And granted that under this proposal there would be
23 something added for the author or creator of the work.
24 Would you expect that Congress would also have to re-balance
25 the rights of users of materials? Not necessarily in a way
that is detrimental to the rights of the creator. I don't
think Congress -- well, they often do. But I don't think
they plan on giving and taking away at the same time. But
with regard to making materials available whether through
collective administration systems for libraries or something
like that. What are your thoughts on that?

1 MS. MANN: It's not an issue that I have given
2 prior thought to. I will concede that.

3 But it seems to me that with the problems
4 confronting copyright and the copyright owner community vis-
5 a-viz users, libraries, educators, non-commercial users of
6 works, the friction there seems not so much to be tied to
7 the term of protection as it does these new -- the Acting
8 Register said she is going to a ceremony. She has left us
9 to go to a ceremony in the other building in the library on
10 an agreement concerning the usage of the CD ROM.

11 It's those issues relating to technology and new
12 ways of accessing works in libraries that enable folks to
13 potentially make uses of works beyond personal research
14 which is the kind of intention of why one would originally
15 have gone to a library to look at a paper. They raised
16 greater concerns for the committee rather than duration.
17 But you're right. This is probably something that will be
18 brought up in the congressional process and we will hear the
19 arguments and proceed from that. But I really think it is
20 the digitalization of works and the availability of works.
21 And that's going to be the bigger issue to deal with.

22 MR. SCHWARTZ: In following up on that, of course
23 it is important how the library uses the work. But
24 availability is important. And yet as some suggest, the law
25 is about balancing and you're giving the author creator 20
additional years. The way the revision of copyright law has
run its course there is always some consideration for the
user community.

My question really was about availability because
we really are talking about works being available.

MS. KRETSINGER: If I may add on that question,

1 and this is not a question that you may have an answer for.
2 But I think one of things that users try to find when they
3 try to look at some of these older works already is that
4 there is not a clear chain to the copyright owner. And
5 library groups and users are trying to make stuff available
6 and they don't know who has the copyright. This is just an
7 issue, particularly when you are talking about pseudonymous
8 and anonymous work. They are not claiming copyright anyway.

9 MS. MANN: I understand what you're saying. And
10 with your question as well, is it a question of how the
11 libraries and educational users know who the copyright
12 proprietor is?

13 MR. SCHWARTZ: I guess it's both. Part of it
14 would be the user coming in wanting to see chain of title.
15 But also, part of it would be whether or not libraries are
16 going to know that they can receive works and use them in
17 the library with the voluntary registration system and works
18 obviously not under mandatory deposit for the Library of
19 Congress. That would be the question. How will they get
20 them?

21 MS. MANN: In our own industry there are pretty
22 much discreet places where you would go to find out who the
23 copyright owner of a work is. The Harry Fox Agency, which
24 is a subsidiary of NMPA is the place where most would start
25 for a musical work. From discussions that I am aware of
from other industries, while collective administration is
not necessarily the goal in every case other industries are
looking at ways to track copyright ownership because of
these new technologies uses and data bases.

I hear Steve Metallis talk about things like No
Bots, telling people what you are using and when. And I

1 think that there may be answers in technology to some of
2 these problems. But it certainly is something that is going
3 to have to be discussed in the course of consideration.

4 MR. SCHWARTZ: Let me ask another question,
5 probably from a more difficult subject following up from the
6 previous panel -- That's termination. I wonder if you have
7 some thoughts on it because what little research have done
8 in this area on this extension, obviously that was a crucial
9 issue in allowing the United States to go to life plus 50
10 year term at all was a resolution with authors of the
11 termination problem. And I'm wondering what authors, what
12 we can expect to hear from them, and how you would see a
13 resolution of the problem.

14 MR. SANDERS: I think that we would want to echo
15 Mr. David's comments that it's an issue that has been
16 brought up in discussions among the various industry groups.
17 It's one that we certainly would hope to come to a consensus
18 on and be able to come to the Copyright Office, to come to
19 the Congress and say yes, we have considered this and here
20 are our suggestions. And that's what we are working toward.
21 I think the dialogue has been established on this issue.
22 Hopefully, in the near future we will be able to come back
23 to you with a consensus.

24 MR. SCHWARTZ: When you say we, you are talking
25 about authors' groups resolving this?

 MR. SANDERS: Specifically in the music area right
now. But I believe it's extended beyond that on some levels
with the Coalition. And it's certainly an issue that is in
the fore.

 MR. SCHWARTZ: I just have one more question. If
Berne Protocol does not incorporate an extension of term and

1 the EC Directive is implemented in form and fashion by
2 Parliament and goes into force, would you think it is fair
3 to characterize this more as a problem between the United
4 States and the EC over issues of national treatment?

5 The EC can if it wants to under the rule of
6 shorter term. It's permissible. And so they could clearly,
7 if they want to, grant a life plus 70 year term to American
8 authors if there is some resolution of the other issues of
9 national treatment for other rights which may be
10 economically as valuable or more valuable to the various
11 industries on rental royalties, video levies and the like.

12 MS. MANN: I think at this juncture it's probably
13 proper to say that the biggest threat right now is
14 escalating the tension between the U.S. and the EC or what
15 we view as the Community's reversion to retroactivity and to
16 reciprocity on any number of what appears to be their
17 endless supply of cunning and coming up with new ways to
18 twist the reciprocity knife into United States industries.

19 But to view Berne protocol as the only vehicle for
20 international harmonization outside whatever relationships
21 there are between the U.S. and the EC I think ignores some
22 of the major successes that the U.S. has had in the
23 bilateral arena. Seeking, for example, full copyright
24 protection for computer programs as literary works was
25 something that the U.S. insisted upon in bilateral
 negotiations.

 And I don't think we would have had any success
getting this raised as an issue in the Berne Protocol if it
hadn't been for that early ground work raised bilaterally.
My hope would be that once the EC's Directive is approved at
the end of December and becomes a binding obligation upon

1 the member states, that the Community will make a statement
2 at the next Berne Protocol meeting asking that this issue be
3 raised again on the agenda. And I would hope that our
4 government, our delegation would be in a position to support
5 that or at least support continued dialogue on that point.

6 Because, of course, the extension of the copyright
7 term to the life of the author plus 70 years was on the
8 original Berne Protocol agenda and was kind of cut back to
9 discussion of extension of term for photographs. And by
10 that I mean extension to life plus 50 for photographs
11 because there wasn't a clear consensus on where or how to go
12 with it in the earlier discussion. With this action in the
13 EC, we would hope that there would be some impetus in
14 restoring it to the agenda. And if it is not restored to
15 the agenda immediately that there will be other
16 opportunities through increased bilateral attention on an
17 issue like this to do that perhaps at a later time.

18 MR. SCHWARTZ: Thank you very much.

19 MS. SCHRADER: Thank you Ms. Mann and Mr. Sanders
20 for your testimony. It's been very helpful.

21 We will now take a short break for about 15
22 minutes and resume at about 20 of 12:00 for our next
23 witness, Mr. Sorkin.

24 [Recess.]

25 CHAIRPERSON LEVERING: Our third witness is
Bernard Sorkin, who is here on behalf of the Motion Picture
Association of America.

Mr. Sorkin is a well known copyright attorney. He
represents Time Warner, Inc., and he served as attorney for
Columbia Pictures from 1952 to 1960. We welcome you today.

MR. SORKIN: Thank you. I thought I would be

1 joined by my mentor, one of my many mentors, Fritz Attaway,
2 senior vice president of the Motion Picture Association.

3 MR. ATTAWAY: I was afraid they were going to ask
4 me a question.

5 MR. SORKIN: No. I'm afraid they're going to ask
6 me, so I want you here.

7 [Laughter.]

8 MR. SORKIN: The panel I think will be happy if
9 not relieved to know that my statement is very, very short.
10 Basically, I agree with what has been said by Mr. David and
11 Ms. Mann, and with the comments submitted in the joint
12 comments. There are just one or two, maybe three points
13 that I would like to emphasize from the perspective of the
14 motion picture industry.

15 American motion pictures are hugely accepted by
16 foreign audiences with the result that motion pictures are
17 one of the few American products to which there is a
18 favorable balance of trade.

19 If our term of protection does not keep pace with
20 what is provided abroad, and particularly in the European
21 Community which is a huge part of the foreign market for
22 motion pictures, foreign territories will apply the rule of
23 the shorter term to deny protection to American movies.
24 This will reduce the inflow of revenue to the United States
25 with the resulting loss of revenues available for motion
picture production.

In that connection, I tore out and brought with me
page 16 of the latest issue of Variety, which as the panel
knows is the motion picture and other entertainment industry
trade paper. The page I have torn out has what they call
the international box office chart. And it shows how

1 pictures are grossing at box offices in a number of
2 countries throughout the world. And there is an article
3 which is headed Fugitive -- which is an American picture --
4 Still Tops in Euro BO, which is Variety-eese for European
5 box office.

6 You don't have to be a statistical expert to learn
7 from this how hugely accepted are American movies in foreign
8 countries both in terms of the number of pictures that are
9 among the top ten that are listed for each country, and in
10 terms of the relative dollars earned at the box office. And
11 if it is possible to do so, I would like to put this in the
12 record of this hearing.

13 CHAIRPERSON LEVERING: Yes. Thank you.

14 MR. SORKIN: Aside from that, there is a domestic
15 component to this position as well as the international
16 component. They are kind of intermixed, and I would like to
17 get to the intermixture in just a moment. But there is
18 another point to be made which has both international and
19 domestic aspects. And that is that newly developed and
20 developing technologies have created new avenues for the
21 distribution of motion pictures.

22 We see some of them in the huge increase of cable
23 channels which are just mouths to be fed with programs.
24 Motion pictures will be a large part of that. New life is
25 thereby given to older works. For example, even limiting
ourselves to theatrical exhibition, the traditional
exhibition, one of the pictures which is doing very, very
well in Australia is Bambi. It was a picture which was
released many, many years ago. And were it not for extended
protection, pictures like that would very soon fall out of
the public domain. And here too a loss of copyright

1 protection would mean a loss of revenues both from abroad
2 and domestically.

3 The question was raised, and properly so I must
4 agree, doesn't copyright mean that a bargain has been struck
5 to meet the other social needs so to speak to balance the
6 needs of the public for ready availability of these works as
7 against the needs of the creator or creating entity for
8 protection?

9 Yes. A balance must be struck. But I think there
10 are two things that must be said. Number one, there is
11 nothing magic about the number that has been reached today.
12 The Constitution does speak in terms of for limited times.
13 It is not defined. We arrived at the life plus 50 and at
14 the 75 for works for hire. And it's a good number in the
15 context of where the world was. But there is no reason why
16 an extension should be thought to be contrary to public
17 policy in any sense.

18 But more than that, and I think this was touched
19 on to some extent in the questions and answers of the two
20 previous speakers, the question of availability of product
21 is not merely one of freedom of product to be taken.
22 Availability of product, and this is particularly true of
23 motion pictures. Availability of product has a number of
24 other components. It means making the physical carrier of
25 the product available in a way that is useful, that is good
to see. And it means also marketing, publicizing, promoting
the product.

 If people don't know that it's there, it might
just as well not exist. And one of the functions of a
distributor of motion pictures is to do just that. To put
huge resources into making the product fit to be seen, so to

1 speak, and also to have the public know about it so that
2 they will come out and see it. And then, of course, to
3 operate what is usually, perhaps always, a very, very
4 expensive distribution organization to get those things to
5 the public.

6 Without that, public domain product will just sit
7 -- with exceptions -- will just sit and not be known. Or if
8 it is known, it will be known in copies that are simply not
9 suitable for knowing. We know that today through a large,
10 large extent in terms of so-called pirate product.

11 Protected product that is illicitly made. Just made in
12 terrible copies and not worth seeing.

13 There is no reason to suppose that if something
14 goes into the public domain the copies that will be made for
15 public viewing or exhibition will be any better because when
16 something is not protected the incentive to put the
17 investment, the huge resources that are necessary to make
18 this product suitable just isn't there.

19 I know that there are exceptions to that. You can
20 get many, many editions of Shakespeare's works in very, very
21 good form. And right in this building in the wonderful book
22 store and gift shop on the ground floor there are public
23 domain books wonderfully bound and wonderfully illustrated,.
24 Black Beauty and other similar works, being sold for \$1.
25 That's fine. I think those are exceptions to the rule.

They are works that have achieved a certain level, a
relatively high level of popularity so that somebody is
willing to come along and put the money into them.

I would like to add one thing. It's not really an
addition. It appears in the paper that has been submitted
to the panel, but I think it requires some emphasis. And

1 that is with respect to what is to be done for works for
2 hire. The question was raised as to whether a similar 20-
3 year extension should be provided. Isn't the current period
4 enough?

5 I would like to suggest to the panel that for two
6 reasons at least a similar extension should be provided to
7 works for hire. First of all, perhaps the lesser of the two
8 reasons, the U.S. tradition -- and there is no reason why it
9 should change -- has never previously discriminated between
10 different kinds of works. More or less the same kind of
11 protection was offered to both. The second reason, and the
12 more important one I believe, is that the extension should
13 be made almost irrespective of what the European Community
14 does.

15 It's good for the American entertainment business,
16 for the motion picture business on which I focus
17 particularly to have that extension because it is under the
18 work for hire umbrella, so to speak, that these kind of
19 works can continue to be made available. We don't have in
20 the context of motion pictures very much by derivative works
21 being made from a movie. One seldom makes a book from a
22 movie. What they do have are sequels to movies being made.
23 And they are generally, not always, but generally made by
24 the owner of the movie, the first creator. And again,
25 because it is a movie it peculiarly needs a work for hire
 kind of protection.

 Peculiarly, I say because unlike the authorship
notion which prevails on the European Continent and
elsewhere in the civil world countries, where in my view at
least what copyright seems to depend on is something like
Puccini's view of the Bohemians with the painter and the

1 author and the philosopher. They produced wonderful things.
2 They could in no way produce a motion picture. And they
3 certainly could not produce a motion picture that would be
4 successful worldwide.

5 To do that requires huge, huge resources. If I
6 may ask my mentor what the average production cost is.

7 MR. ATTAWAY: Negative costs are around 24 million
8 and another 10 to 15 million promotional costs.

9 MR. SORKIN: So that's average, and you know what
10 average means. So there is that cost. Secondly, insofar as
11 the EC extension is concerned, with respect to motion
12 pictures they have this four-person rule for measuring the
13 life length of the copyright owner.

14 With the four-person rule, you may come out to
15 well low beyond what 75 years or 95 years even for a work
16 for hire would be simply because if they are smart enough to
17 hire a teenager to do the dialogue their protection can go
18 on forever because it is measured by the lifetime of the one
19 with the longest longevity.

20 I made the point about the real availability. The
21 only other point that I would like to make before thanking
22 you for your courtesy is that however enthusiastic and
23 broadly based the support for the proposal for extension of
24 term is, it's not likely history teaches us that it will be
25 taken care of tomorrow. There is going to be some time
 while this panel considers it. There will be a longer time
 I assume while Congress considers it.

 We could have some ironic and tragic instances of
 things falling into the public domain between now, let's
 say, or the end of the year and the time that such a law is
 enacted as I hope it will be. And to avoid that

1 eventuality, what I would hope the panel will recommend is
2 that there be an interim year to year or two years if you
3 would, whatever seems to be appropriate, extension of
4 copyright as was done during the hearings that led up to the
5 current copyright law. I thank you.

6 CHAIRPERSON LEVERING: Thank you very much, Mr.
7 Sorkin. I'd like to just pose a question that is more of an
8 observation that some have made and ask you to comment on
9 it.

10 I recognize that you are actually representing
11 especially the motion picture industry and this may not be
12 as significant in that area. But I'd be interested in your
13 views on this. Excluding considerations of fair use,
14 extensions of copyright duration some say would further
15 stifle potential biographers who fail to obtain permission
16 to use protected source material. I wonder if you would
17 comment on that.

18 MR. SORKIN: Well, you've excluded considerations
19 of fair use from your question, so that's unfair.

20 CHAIRMAN LEVERING: That's such a gray area.

21 MR. SORKIN: Granted that it is. And I think what
22 we run into there is the usual clash between protection and
23 availability for various users.

24 When you say biographers, it's hard for me to
25 exclude fair use and I think the courts recently have been
moving in a direction which allow broader usage by scholarly
people. Biographers, historians and others.

Other than that, I don't know how to answer your
question except at the day and accepting the strictures you
put on it, I come down on the side of protection because I
think it is terribly important for the public. And even the

1 scholarly community in the long run benefits by the real
2 availability of all of these whether they be movies or books
3 or songs or anything else.

4 CHAIRPERSON LEVERING: Others also maintain that
5 extending the duration of copyright does amount to an
6 extension of a monopoly in the copyrighted material to the
7 author and his or her heirs. And that this reduces public
8 distribution and availability of protected works, and some
9 say it stanches the flow of the market place of ideas.

10 Would you care to comment on that?

11 MR. SORKIN: I want to go back to the point I was
12 trying to make before.

13 I think that the protection of the works,
14 particularly with what has developed today and is going to
15 develop tomorrow -- that is to say the huge number and
16 variety of avenues of distribution -- that the protection of
17 the works will have just the opposite effect. It will lead
18 to them being made more available and in better form. By
19 better form I mean in ways that they will be more useful and
20 in fact more pleasant.

21 There is also a kind of element of -- I can't
22 think of the word. But an element of joy, if you will, in
23 watching and listening and reading.

24 CHAIRPERSON LEVERING: Especially when the copy
25 that you are looking from is a high quality reproduction.

MR. SORKIN: Precisely so. If you think in terms
of movies, it's obvious because of the making of a good
print.

An example that was brought to my attention
recently is Snow White, which was re-released by Disney at a
tremendous cost. A picture that was originally made in

1 1937. If it were re-released by somebody who did not have
2 the incentive because of protection to put good prints on
3 the screen, there would be nothing to see. Not only the
4 incentive to put good prints on the screen, but the
5 incentive to let people know that it's coming to the screen.
6 That is a very, very expensive undertaking in these days of
7 television advertising. Just as a small aside which may
8 cast a little bit of light on it, and I hope you don't think
9 it is too irrelevant.

10 The very reason that many motion pictures today
11 are originally released in as many as 2,000 theatres
12 simultaneously in the United States is because of the
13 expense of advertising. You have to kind of spread the huge
14 advertising cost, much of which is on television, over a
15 large audience.

16 CHAIRPERSON LEVERING: You certainly make a very
17 strong case for the points that you have made, especially in
18 the area of motion picture production each one of which is a
19 very major production and involves all of the complexities
20 that you have described.

21 Extending the duration of copyright is also a
22 blanket. If it happens it is a blanket extension. So it
23 covers many other forms of production. And some maintain
24 that it would create a costly administrative hassle in the
25 broader sense by requiring subsequent changes in duration to
works for hire, anonymous works, corporate works and so
forth. A very broad range of other categories of things.

Would you comment on that?

MR. SORKIN: I may be losing the point you are
making, Ms. Levering. I don't see the administrative
hassle.

1 If the work for hire protection were extended by
2 20 years also, I don't think it would create any significant
3 problems. At least none that I appreciate.

4 CHAIRPERSON LEVERING: A lot of additional
5 recording as pieces change hands and so forth. Changes need
6 to be recorded and researched and identified.

7 MR. SORKIN: Oh. Well, I think if pieces do
8 indeed change hands, and I assume you are saying during the
9 extended term.

10 CHAIRPERSON LEVERING: Yes.

11 MR. SORKIN: If pieces do indeed change hands
12 there will be I suppose, as just during the extant term,
13 good transactional reasons for that. And if there is no
14 undue administrative hassle, and you and your colleagues
15 seem to be handling all of those things very well here,
16 there shouldn't be any additional hassle.

17 CHAIRPERSON LEVERING: Thank you very much, Mr.
18 Sorkin. I also heard that little plug for our continued
19 good administration of our own activities no matter what
20 happens.

21 That is a goal we are very committed to. Thank
22 you very much. Dorothy?

23 MS. SCHRADER: There are, of course, special rules
24 for the term of motion pictures under Berne and therefore
25 under the EC Directive. But a common provision that is
applied is 50 years from the making. And under the EC
Directive as I understand it, the term would be 70 from
years from making or publication.

 Your proposal obviously would extend the term in
the U.S. to 95 years because most of your works are works
for hire and the term would be measured by that provision.

1 Are there any other countries that have a term of protection
2 of 95 years for motion pictures or other large categories of
3 work?

4 MR. SORKIN: I don't know the answer to that, Ms.
5 Schrader. But I would suggest as I did before that in the
6 EC with this four-person life-span measurement it could well
7 come to that. But that is not the brunt or real thrust of
8 my position although it is part of it and it is not
9 unimportant. The real thrust of my position is that an
10 extension would be desirable for economic reasons and for
11 social reasons.

12 I would go so far as to say, and one shouldn't do
13 this. Mr. Schwartz said before that one shouldn't ask a
14 question if you don't know the answer. And I guess one
15 shouldn't put in an aside without knowing where it is going.
16 But I would go so far as to say that if the EC had not made
17 this effort I would nevertheless support extending the term
18 of copyright. Because what happens when motion pictures or
19 other protected works fall into the public domain, it's no
20 good from anybody's point of view.

21 MS. SCHRADER: Well, of course, we are dealing
22 with a public domain in the United States that is now
23 measured from about 1918. That is, assuming the work had
24 been duly copyrighted and renewed for a 75 year term in
25 1918.

 So obviously the overwhelming bulk of motion
 pictures would still be probably under copyright having been
 created since 1918. One could certainly understand how you
 would be in favor of an extension of that term of
 protection. And now I finally come to my question.

 Is there any real limit that you would place on

1 that extension? Why 20 years? Why not 50 more years? You
2 probably would very much favor that, wouldn't you?

3 MR. SORKIN: Yes. I would agree with that.

4 MS. SCHRADER: But as a matter of policy you
5 therefore come to the matter of what is the real economic
6 justification under the copyright law for further extension,
7 especially as to existing works?

8 MR. SORKIN: There are two things. And I have
9 absolutely no hope of picking a number on which we could all
10 agree as being the right number for this. But while it is
11 true that motion pictures are still under protection, time
12 goes by very, very swiftly. And in not many years we are
13 going to find ourselves with motion pictures falling out of
14 production for just that reason.

15 And in not too many years after that, and I like
16 to think we will all be around for this eventuality, we will
17 be dealing with motion pictures as to which the various
18 talents, that is to say the directors, screenwriters,
19 performers, have certain protections under their collective
20 bargaining agreement. And those protections provide them
21 with revenue for the continued use, the continued
22 exploitation of those pictures. Revenue which they would
23 not get if the pictures were not protected.

24 If they were not distributed by the producing
25 companies who were signatory to those collective bargaining
 agreements. So while I can't pick a number and say this far
 and no further, in principle I believe the farther the
 better. And as I say, pictures going into the public domain
 are in a sense worthless.

 If I may offer the one example I can think of, and
 it's a public domain picture which I am sorry to say went

1 there because the company that shall remain nameless failed
2 to renew the copyright on it.

3 It's the earliest, not really the earliest, or it
4 is supposed to be the earliest "A Star is Born" with Janet
5 Gaynor and Frederic March. There was an earlier picture
6 than that. The producing company failed to renew the
7 copyright on that one and nothing is happening with it
8 except that somebody is offering very, very poor quality
9 prints to television. If it were properly exploited, it
10 would be available in a realer sense to a larger part of the
11 public.

12 MS. SCHRADER: I would like to ask a question in
13 relation to the EC.

14 In my experience since I have heard about the
15 negotiations with the EC, we have had a very hard time
16 getting the level of protection that we obviously should
17 enjoy under the Berne Convention under the principle of
18 national treatment. And I ask you the question which is a
19 variation of what I asked the first witness.

20 Unless we do amend our law with respect to term of
21 copyright so that in every detail it is consistent with the
22 level of protection offered under the EC Directive, won't
23 the EC again insist upon reciprocity and say that you
24 haven't gone the full mile? You're not going to get this
25 protection. We're going to deny you the benefit of the
 added term. Are we going to be able to cross every T and
 dot the I?

 MR. SORKIN: My crystal ball is notoriously
 cloudy. I am prepared to accept that there is a good
 likelihood that they will. The history of negotiations
 teaches us that they will.

1 But I don't think it follows from that that we
2 shouldn't try. That we shouldn't advance ourselves in every
3 respect in which we can to put on negotiators in the
4 strongest possible position.

5 If it doesn't work, if nevertheless what you
6 foresee in your question comes to pass, if it hasn't availed
7 us of the kind of national treatment for which we are
8 looking to the EC, we are still better off domestically for
9 the reasons I have tried to outline in terms of the
10 extension.

11 MS. SCHRADER: Thank you.

12 CHAIRPERSON LEVERING: Thank you. Marilyn?

13 MS. KRETSINGER: I guess I sort of have a follow-
14 up to that last question that Ms. Schrader asked.

15 Basically, if the Berne Convention is not modified
16 with respect to duration and you already have a longer
17 potential term than the EC Directive is harmonizing, then
18 basically what you would get by the extension is just longer
19 protection in the United States. Is that correct?

20 MR. SORKIN: Yes.

21 MS. KRETSINGER: My other question is a question I
22 have asked everybody so far. I just want to see what your
23 opinion is on this too.

24 If the term is extended and you see the benefit as
25 going to the motion picture company, would you not be in
favor of any kind of agreement that would give part of any
royalties coming in under an extension to some government
arts subsidy?

 MR. SORKIN: You are touching on a very personal
thing here. I strongly favor subsidies to government arts
endeavors, to the National Council and so forth. I don't

1 think that a particular industry should be fingered, if I
2 could use that word, for those payments.

3 Ms. Mann, I think it was, in responding to the
4 question made the point I think quite correctly that it
5 would create difficulties for our negotiators who are trying
6 to avoid precisely those kind of developments abroad. But
7 quite apart from that and focusing only domestically, it
8 seems to me not good policy to look to a particular group of
9 industries or an industry itself.

10 Let's say the copyright owner, and obviously I am
11 speaking in general, to look to them for that kind of
12 subsidy. And the reason is twofold. One is just as a
13 matter of economics. One of the reasons for an extension of
14 copyright term is to create revenues from which more
15 copyrighted works can be produced. In the context of the
16 motion picture industry, to produce more pictures. A
17 societal good.

18 The other reason, which is a bit more amorphous,
19 if you will, is that I think the support of the arts is so
20 vital to the good of a country and to the good of a society
21 that that support should come from the community at large,
22 from the taxpayers.

23 MS. KRETSINGER: There is nobody in this room
24 perhaps except Fritz who can say that he understands motion
25 picture financing.

 MR. ATTAWAY: Hardly.

 MS. KRETSINGER: You're not going to say that you
do?

 MR. ATTAWAY: Absolutely not.

 MS. KRETSINGER: I think that this is one of the
arguments that those people who oppose extension will make.

1 Isn't this just another bill that would give more money to
2 people who don't need it?

3 That is why I was asking my question. Wouldn't it
4 just simply give more royalties to big companies? To well
5 known authors and composers?

6 MR. SORKIN: Small companies as well. And I
7 assume not so well known authors and composers as well.

8 To go at this backwards, an author or composer not
9 too well known may find that his or her works become well
10 known and profitable far down the line, long after the
11 work's creation. Perhaps even after the death of the author
12 or composer and then it becomes well known. And surely his
13 or her heirs need it.

14 So far as the motion picture companies are
15 concerned, yes. I guess when we discuss these things we are
16 burdened with the notion that a lot of the motion picture
17 companies and their executives are very, very rich. That's
18 why they send Fritz and me to these meetings because we can
19 appear less so.

20 But the fact is that there are small motion
21 picture companies who can benefit from this and produce
22 material that is very, very good for the public to have.
23 And even the big motion picture companies, rich as they are,
24 need more money to produce more pictures.

25 MS. KRETSINGER: Thank you. I don't have anything
else. Eric?

MR. SCHWARTZ: Thank you, Marilyn. During the
enactment of the automatic renewal bill a year and a half
ago, the only opposition that surfaced was from distributors
of motion pictures. And there are distributors and then
there are distributors. Some are distributing works which

1 certainly like A Star is Born still have commercial
2 viability, but because of unfairness in past law and
3 inadvertence are in public domain.

4 And then there are other pictures which because of
5 the way the companies that produced them disappeared would
6 not be distributed but for some distributors. They are
7 public domain materials. They have access to it. They are
8 not always the best quality. Sometimes it's the only
9 surviving material and they do distribute it.

10 One of the issues that arose during the automatic
11 renewal bill were their concerns. Part of the way their
12 concerns were addressed was the fact that this bill was not
13 retroactive. So that it was a certain amount of certainty
14 for companies distributing works that if they were
15 distributing before 1964 either the work had been renewed
16 and was still under protection or it was public domain and
17 so forth.

18 How would you respond assuming we can expect to
19 hear from these same organizations soon? How would you
20 respond to their concerns and do you think they are serving
21 a legitimate purpose by distributing works that the public
22 otherwise wouldn't see?

23 MR. SORKIN: I think that they are serving a
24 legitimate purpose in that context. As I said, I think the
25 public would be better served if the material were protected
 and was distributed by a company that had the incentive and
 resources to distribute it properly.

 But insofar as companies or people are concerned
 that have gone into the business of distributing, put an
 investment into it, if you are raising a question about
 retroactivity in my view that can be handled by allowing

1 that business to continue with that material.

2 MR. SCHWARTZ: Another question also focusing only
3 on pre-existing works because I think there is a strong case
4 for promoting creativity to create new works.

5 But it doesn't necessarily follow as it did in the
6 automatic renewal debate because these were works that were
7 already in existence.

8 This is an issue that arose during the Film
9 Preservation Board hearings last February in Los Angeles.
10 And it's a concern of archives. And I will put on another
11 hat as an employee of the Library and a large film archive.
12 Archives that have spent 20 or 30 years preserving the
13 material, in some cases at taxpayer expense or great
14 taxpayer expense, now find themselves in a circumstance of
15 works where there were no additional commercial uses for
16 them at the time they were received. Either they were
17 received through copyright deposit or likely they were
18 received through donor arrangements. And there is now, as
19 you said, the tremendous markets for works. But the
20 archives have spent money for years in some cases preserving
21 the only existing material. What sort of concessions would
22 you expect?

23 Or what would you foresee happening in the area
24 for the public archives? I'm talking primarily about public
25 archives with regard to providing retroactive protection for
 works. Because especially now you are talking about films
 for 1918. You are coming through the end of the silent era
 and into the talkies. And these are the ones that are going
 to have the most commercial viability.

 MR. SORKIN: I must confess, Mr. Schwartz, that I
 haven't thought about that. But let me give you a very much

1 off-the-top-of-the-head notion. You've combined I think two
2 issues -- and I hope I am not doing this an injustice. One
3 is the question that had been raised I think by Ms. Schrader
4 earlier. And that is, if the work is already created, what
5 are we talking about? You don't need an incentive for
6 creation.

7 And then the second issue I think is kind of can
8 we think in terms of an appropriate compensation for the
9 archive investment and preservation.

10 As to the first, sure. It is true. The work has
11 been created. You don't need an incentive for creation.
12 But you do need an incentive for distribution and all that
13 goes with distribution. I've tried to outline some of those
14 things. Hugely expensive. And that is what availability to
15 the public means.

16 As to the second part, I just don't know. I
17 suppose there can be, there should be some kind of
18 contribution by the companies benefitting from the use of
19 this material to defray in whole or in part these expenses.
20 As I say, that's just off the top of my head and I haven't
21 thought about it at all.

22 I would think the other side of the coin is the
23 archives, the Library of Congress being the stellar example,
24 have performed and continues to perform a public service in
25 maintaining this material so that scholars can go in and
work with it. And they do so at taxpayer expense. And it
doesn't seem to me to be any less worthwhile in activity or
more needful for compensation from a private area than
building a road.

 MR. SCHWARTZ: Just to follow up on that thought,
some of the costs are not simply distribution but

1 maintenance of the materials.

2 And then in some cases it is the maintenance of
3 the only surviving material which under the donor
4 restrictions that were signed the copyright owner can recall
5 the material now for the duration of copyright. So you are
6 clearing changing the balance of negotiation by 20 years for
7 the archives. Or in some cases there were donor
8 restrictions that were perpetual.

9 But still there is an ongoing cost to the Library
10 of Congress, for example, in simply maintaining the material
11 that is being retrieved and distributed. And clearly there
12 is a cost for the distribution.

13 MR. SORKIN: Yes.

14 MR. SCHWARTZ: Last question just to sort of probe
15 your expertise on retroactivity.

16 MR. SORKIN: You just got to the bottom of it.

17 MR. SCHWARTZ: No. I don't think so. This is
18 more maybe a political question than a legal one.

19 With the Mexican example and with the only other
20 bilateral example I am aware of, the Russian Trade
21 Agreement, and there probably will be others maybe before
22 the end of the year in Poland and other countries, do you
23 think as a political matter that retroactivity should be
24 considered first on a bilateral basis, country by country
25 basis sort of as a test case to see how successful it is and
then try to broaden it for domestic markets assuming that
there is going to be more resistance to it domestically?

 MR. SORKIN: My political sense, which is about as
close to non-existent that it can be, is that the answer is
yes.

 It should be done on this kind of step-by-step

1 basis to see what happens before we get into the more what I
2 think are onerous constitutional problems.

3 MR. ATTAWAY: Step by step, but not country by
4 country. You're not suggesting that we wouldn't grant
5 national treatment to foreigners.

6 MR. SORKIN: No.

7 CHAIRPERSON LEVERING: I'd like to follow up on
8 the discussion of the previous question if I may. The
9 discussion between Eric and Mr. Sorkin.

10 On the point of the cost of archiving and
11 preservation and your response, Mr. Sorkin, that you
12 maintain that is a very reasonable concern but you feel that
13 that should also be supported at taxpayer expense since it
14 does benefit the common good. I would like to add the point
15 that recognizing the validity of both of those points there
16 is another reality that is facing us today.

17 The current fiscal situation in our country is a
18 very real one in which financial resources at the
19 government's discretion are definitely diminishing. The
20 government has to exercise more restraint. And as a
21 personal taxpayer I certainly support this. But I recognize
22 that in an area such as we are discussing that it has a very
23 negative impact. And so we are facing that reality.
24 Therefore, what are we going to do about that?

25 The concern that you say that such expenses should
be borne at taxpayer expense, that's a very reasonable
argument. On the other hand, we have diminished federal
resources. How do we slice that pie and where does it go?
And when that slice hits in things such as preservation of
these wondrous creative products that we have, the archiving
and making them available to future generations, when we can

1 no longer support that how do we do that?

2 So it does behoove us to look to other creative
3 ways to face that issue and perhaps to support it. So I put
4 that concern into the equation.

5 MR. SORKIN: You have probably put into the
6 equation one of the most fundamental concerns that arises in
7 all of our society's activities today. And clearly, slicing
8 is going to have to happen in a lot of places. And slicing
9 in many of those places -- and this is true not only in the
10 public sector but in the private one as well -- is terribly
11 unfortunate. Tragic in many instances. I don't think what
12 we are talking about here rises to tragic. But it could be
13 unfortunate.

14 Maybe an answer is -- and Mr. Attaway may want to
15 add to this -- is to return to the copyright owners and what
16 they have given so that would reduce your maintenance costs.
17 Maybe that doesn't do anything. Maybe that's insignificant.
18 I don't know. I don't think the answer should be to deprive
19 the copyright owners of their right in order to meet that
20 fiscal problem.

21 I think that would be not only unjust but bad from
22 society's point of view for the reasons I have outlined.

23 MR. SCHWARTZ: I don't think the Library would be
24 suggesting at all that it wouldn't continue to allow the
25 copyright owners to have their rights. Just that there
would be some sort of a mutually worked out agreement. I
don't think that the Library would necessarily want to give
back the material.

It's a little bit like taking a beat-up car and
spending in this case millions of dollars to fix it up and
then returning it, and building a garage and storing it as

1 well. I think they would probably want to retain it.

2 MR. SORKIN: I wish I were clever enough to offer
3 a solution to the fiscal problem.

4 MR. SCHWARTZ: I think it will come to
5 negotiation.

6 CHAIRPERSON LEVERING: It will have to because it
7 is a reality that is definitely facing all of us.

8 Also, the question that you had posed to each one
9 of the witnesses, Marilyn, is coming from the same
10 underlying concern, which is in an era of diminishing
11 resources how do we try to share them equitably to make sure
12 that we continue to nurture the creative spirit and creative
13 talent of the new generation coming up? These are very
14 difficult issues. But we thank you very much for sharing
15 them.

16 MR. SCHWARTZ: I'm sorry. I just wanted to
17 publicly thank Mr. Sorkin and Mr. Koenigsberg before the
18 time had expired for all of their efforts on behalf of the
19 Copyright Office and the Library -- all of their creative
20 efforts in helping to prepare the ACCORD Report. The staff
21 of the Librarian and I know the Copyright Office are really
22 grateful. Thank you.

23 CHAIRPERSON LEVERING: Indeed. I'm very glad you
24 spoke up on that, Eric. I think that we all benefitted by
25 that. Turning to the ACCORD process, this is the Advisory
Committee to the Library of Congress on Copyright
Registration and Deposit.

And, indeed, I think that we all benefitted from
the deliberations and the very intensive discussions that
that has been, as well as the final report.

We are trying to put all of that good work into

1 good use in future plans. We share your thanks and your
2 recognition.

3 MR. ATTAWAY: If I may. Now that I'm sitting here
4 I can't resist putting in my 2 cents worth.

5 I urge you in considering this issue to think of
6 copyright not just as the incentive for individuals to
7 create bits of intellectual property. But copyright is the
8 foundation of industries that are essential to our national
9 economy. The copyright industries are major businesses
10 which contribute tremendously to employment and particularly
11 foreign trade.

12 We are going to be net exporters of copyrighted
13 material for the foreseeable future. So the issue of
14 extension of term when weighed or measured against the
15 overall public interest, I think is a no brainer. Of course
16 we should extend term.

17 It would be absurd for Congress to think of
18 enacting a law that would limit the ability of Boeing to
19 market airplanes abroad. It is absurd for Congress not to
20 pass a law that enhances our ability to market our product
21 both domestically and abroad.

22 It is in the overall public interest. It may be
23 an inconvenience to a biographer here or there, but I think
24 that inconvenience is minuscule when measured against the
25 overall good that extension of term will provide for
copyright industries in our economy. That's my final
comment. Thank you.

CHAIRPERSON LEVERING: Well stated. And again it
summarizes the point that has been made I think very clearly
today by several witnesses that copyrights indeed have
balancing. Our whole world is a matter of balancing many

1 very, very significant issues.

2 I thank all of you very much. Today's witnesses
3 represent primarily rights owners. We have already received
4 two other written comments and we have been notified that we
5 will be receiving others.

6 I would like to emphasize to everyone in the room
7 that if you wish to file a written comment or additional
8 written comments we welcome this and urge you to do so. It
9 is important that all perspectives are represented. The
10 comment period is open until October 29, 1993.

11 The raw, unedited transcript of this hearing will
12 be available in approximately three weeks. If you wish to
13 obtain a copy you may call the Copyright General Counsel's
14 office at area code 202-707-8380 to arrange to borrow a copy
15 from which you can make your own copy.

16 We tentatively plan to submit a completed report
17 to the Librarian of Congress on the issues that have been
18 discussed today and on which we will receive further comment
19 by the end of January 1994. The Librarian will then
20 determine when that report is to be made publicly available.

21 I would like to thank each of you for coming today
22 and for sharing your interests and background and concerns.
23 We will certainly consider carefully what each person has
24 said both in today's testimony and in your written comments.
25 We thank you very much. This hearing is concluded.

[Whereupon, at 12:30 p.m., the hearing was
adjourned.]